IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 262

THE SHAW-WALKER COMPANY, a corporation; and ROBERT B. HILLYARD and WALTER S. HILLYARD, doing business as SHINE-ALL SALES COMPANY, and LEAH B. WILSON,

Petitioners,

vs.

THE NATIONAL BENEFIT LIFE INSURANCE COMPANY, a corporation; and GILBERT A. CLARK and FRANK B. BRYAN, JR., Receivers of The National Benefit Life Insurance Company, a corporation (appointed in Equity Cause No. 53,391),

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia, and Brief in Support Thereof.

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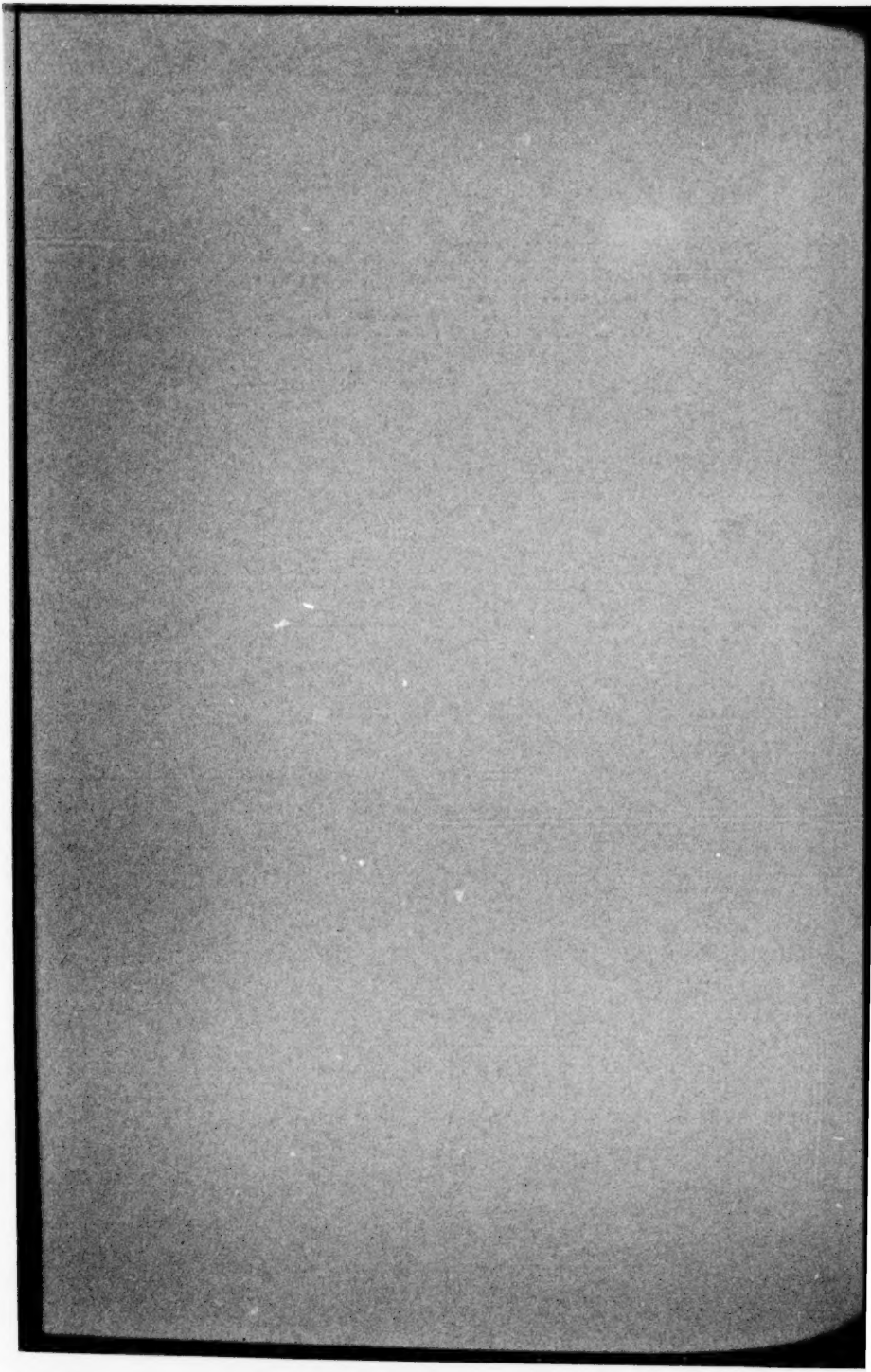
THE REPORTER COMPANY, Inc., Walton, N. Y.
1940



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THE SHAW-WALKER COMPANY, a corporation, and ROBERT B. HILLYARD and WALTER S. HILLYARD, doing business as Shine-All Sales Company, and LEAH B. WILSON,
Petitioners,

vs.

THE NATIONAL BENEFIT LIFE INSURANCE COMPANY, a corporation, and GILBERT A. CLARK and FRANK B. BRYAN, Jr., Receivers of The National Benefit Life Insurance Company, a corporation (appointed in Equity Cause No. 53,391),
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable, the Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States:

The petition of The Shaw-Walker Company, a corporation, Robert B. Hillyard and Walter S. Hillyard, doing business as Shine-All Sales Company, and Leah B. Wilson, respectfully represents as follows:

I.

Petitioners are appellees and respondents are appellants in an equity cause in the United States Court of Appeals for the District of Columbia, being No. 7376, special calendar, on the docket of said Court.

II.

That by the opinion and decree of Justice Rutledge, concurred in by Chief Justice Groner and Associate Justices Stephens—only three of the six members of the said United States Court of Appeals—entered on January 8, 1940 (R. 500), the final decree of March 6, 1939 (R. 130), of the District Court of the United States for the District of Columbia (Justice Gordon) in favor of your petitioners (plaintiffs and interveners in the trial court), decreeing

(1) that the respondent, The National Benefit Life Insurance Company, a District of Columbia insolvent life insurance corporation, be involuntarily dissolved, appointing a receiver, awarding injunctive relief, and decreeing an accounting and distribution of assets of the corporation amongst its creditors,

(2) that a decree passed February 29, 1932, in a case entitled *John Randolph Pinkett v. said Insurance corporation,* Gilbert A. Clark and Frank B. Bryan, Jr., permanent Receivers of said corporation (Equity 53,391), was void for lack of jurisdiction (R. 132), staying equity cause 53,391 (R. 132), and

(3) that this dissolution suit supersedes said equity cause 53,391, was reversed. The cause was remanded to the trial court without granting any relief to petitioners herein (Opinion, Justice Rutledge, R. 515).

Petitioners timely filed (R. 517) petition in the Court

of Appeals specifically praying for a rehearing and reargument before the full bench of the Court, consisting of the Chief Justice and five Associate Justices, but on February 21, 1940, the said petition was denied, including denial of rehearing, without opinion (R.565).

Inasmuch as the usual procedure, which, we contend, is unauthorized, in the United States Court of Appeals for the District of Columbia, is that only *three* of the *six* Judges of the Court sit in the hearing and disposition of cases appealed to that Court, your petitioners, prior to the date when this case would be called for oral argument, filed a motion (R.475), requesting that the Chief Justice and the five Associate Justices sit in the hearing and disposition of this case, particularly in view of its importance. Before oral argument, the Court entered an order denying the right of your petitioners to present their cause "before a full bench" (R.476). The Court required petitioners to argue and submit their cause to Chief Justice Groner and Associate Justices Rutledge and Stephens, and those three of the six Judges of the Court heard and decided the case (R477).

III.

That upon the petition of your petitioners, filed on May 18, 1940, in the Supreme Court of the United States, for an extension of time within which to file their petition for the allowance of a writ of certiorari, this Honorable Court, per Mr. Chief Justice Hughes, entered an order, dated May 18, 1940, providing that, for good cause shown, such time was extended for a period of sixty days from May 21, 1940. (R. 569)

IV.

The opinion of Justice Rutledge (not yet reported in official volume) in which Chief Justice Groner and As-

sociate Justice Stephens concurred (Associate Justices Miller, Edgerton and Vinson did not sit or participate in the hearing or disposition of this case) is contained in the transcript of record at pages 500-515. The opinion is also set forth in advance sheets of Federal Reporter (2d), pages 497-510, issue June 17, 1940, and is to be reported in 111 Fed. (2d) 497-510. It was published in 68 Washington Law Reporter, 426-434, issue May 3, 1940.

The opinion of the trial court (District Court of the United States for the District of Columbia, Justice Gordon presiding), in favor of petitioners herein, is set forth in the transcript of record, at pages 106-117, and is also contained in 67 Washington Law Reporter, 125-128, issue February 10, 1939. See his finding of facts (R. 118-129) and conclusions of law (R. 129-130).

V.

Substantially, the instant statutory proceeding is as follows:

On May 12, 1933, petitioner The Shaw-Walker Company, a corporation, having previously obtained a judgment against respondent The National Benefit Life Insurance Company, a District of Columbia insolvent corporation (a life insurance company for colored people, and which formerly conducted business in the District of Columbia and in approximately twenty-five states of the United States), filed its original bill (R. 1-9) in equity in the District Court of the United States for the District of Columbia, against said Insurance Company, *as sole defendant* (Equity 55,677), for the statutory involuntary dissolution of said insolvent domestic corporation, pursuant to the provisions of the 1929 Code of Laws for the District of Columbia (see Chap. 13, title 5, secs. 409-419, both incl., and secs. 396-397, both incl.,

same as secs. 786-791, both incl., secs. 793-797, secs. 773-774, chap. XVIII, 1924 D. C. Code, as amended), set forth in appendix hereto.

Petitioners Robert B. and Walter S. Hillyard, trading as Shine-All Sales Company, judgment-creditors of defendant corporation, upon whose judgment execution issued, which was returned unsatisfied, intervened (R. 120), as did petitioner, Leah B. Wilson, a policyholder (R. 177-8). Each joined in the prayer of the Shaw-Walker bill (R. 194-5).

VI.

Section 416, title 5, 1929 D. C. Code, appendix (same as sec. 794, 1924 D. C. Code, as amended) provides:

> "416. Involuntary dissolution at the suit of creditors.—When any corporation in the District has remained insolvent for a year, or has neglected or refused for that period to pay and discharge its notes or other evidences of debt, or has, for that period, suspended its ordinary and lawful business, a bill may be filed by the District Attorney, as aforesaid, for the dissolution of said corporation, or, if he shall decline to do so, on the application of any judgment-creditor of said corporation, the said judgment-creditor, if an execution upon his judgment shall be returned unsatisfied, in whole or in part, may file such bill."

Sec. 409, title 5, 1929 D. C. Code (same as sec. 786, 1924 D. C. Code as amended), set forth in appendix hereto, authorizes the District Attorney of the United States for the District of Columbia to file a petition for the involuntary dissolution of a District of Columbia corporation, and the above quoted section 416 authorizes a judgment-creditor of any corporation to file such a petition, under the conditions mentioned in said section 416, if the District Attorney shall decline to do so.

VII.

The bill (R. 1-10) of The Shaw-Walker Company, corporation, among other things set forth:

> (1) that plaintiff was a judgment-creditor of said defendant corporation, upon which execution was issued and duly returned wholly unsatisfied, and that said judgment, interest and costs remain wholly unsatisfied;
>
> (2) that defendant corporation has remained insolvent for a year *and over;*
>
> (3) that defendant corporation has neglected *and* refused for that period to pay and discharge its notes *and* other evidences of debt, including plaintiff's judgment, interest and costs, *and*
>
> (4) for that period, suspended its ordinary and lawful business;
>
> (5) that before filing its bill, plaintiff applied to the district attorney to file suit for the dissolution of said corporation, as provided by the D. C. Code (sec. 409, title 5, see appendix), and that the district attorney declined to do so, advising the plaintiff, through its counsel, that he did so decline, and that the plaintiff was at liberty to bring suit if it saw fit to do so (R. 7).

The bill contained all of the other necessary allegations to comply with section 416, title 5, 1929 Code, *supra,* for a decree dissolving said corporation (R. 1-10), with appropriate prayers (R. 7-9).

As the decree of the trial court, in the instant case, in decreeing that the corporation should be dissolved, also decreed (R. 132) that the Court had no jurisdiction, in a previous case entitled *John Randolph Pinkett against said corporation* (Equity 53,391), to enter its decree (on February 29, 1932), said *Pinkett* case will now be referred to:

The 5th paragraph of the Shaw-Walker bill (R. 3-4) alleged that upon a bill filed by one John Randolph Pinkett, in his individual right, against the defendant corporation, in the district court, the assets of the defendant were placed in the custody of a temporary receiver, Daniel C. Roper, on, to wit: September 24, 1931, and so continued in exclusive control of its properties to and including February 29, 1932, when said temporary receiver was succeeded by the appointment of Gilbert A. Clark and Frank B. Bryan, Jr. (respondents), as so-called permanent receivers, by decree entered in equity cause No. 53,391, *and that since said last-mentioned date said alleged permanent receivers have assumed and exercised complete control of the affairs of the defendant company, and that during all of said time, and for a long time prior thereto, the defendant company was and still is insolvent, and that during all of said time the so-called temporary and permanent receivers for said company neglected and refused to pay and discharge the defendant's notes or other evidences of its debts, as the same accrued and became due, and for such period suspended its ordinary and lawful business and continuously failed in the performance of its corporate functions and responsibilities, abandoned its charter privileges, and same now stands so abandoned by said defendant corporation, and all of its affairs have been surrendered to and have been performed by said so-called temporary and permanent receivers.*

IX.

The above mentioned Pinkett bill for a receiver to conduct the life insurance business of the insolvent corporation (R. 136-145) alleged (R. 140) that there was due and unpaid to policyholders for death, sick and accident claims, a sum in excess of $100,000; for unpaid surrender values, $150,000 (R. 140); that the corporation had obligated itself as guarantor or indorser for $250,000

(R. 141); that former officers had speculated in stocks and lost $462,355.20 of the corporation's funds (R. 142); that a receiver for the company had been appointed in Georgia (R. 142); that commissioners in Georgia and in other states had suspended its licenses to write contracts of life insurance (R. 142-3); that the corporation is insolvent and its financial condition very precarious; *that its capital is impaired and there will be required a sum in excess of one million dollars to make up its impairment and legal reserve in order to obtain permission from the several Insurance Commissioners to do business* (R. 143).

The Shaw-Walker bill also sets forth (R. 4) that the Pinkett bill, filed September 24, 1931 (R. 136-149), while captioned "Bill for Receiver and Dissolution," was merely a bill for the appointment of Receivers to operate, manage and control a life insurance company, *in insolvency,* in the District of Columbia and elsewhere throughout the United States as prayed therein, and that a court of equity had no jurisdiction to grant such relief (see secs. 171-174, incl., 176-177, 179, 181, title 5, 1929 D. C. Code, set forth in Transcript of Record, pp. 482-6); that it was also alleged that the Pinkett bill was not one for the dissolution of the corporation because it did not comply with, or contain any of the necessary allegations provided by section 769, 1924 D. C. Code (same as sec. 392, title 5, 1929 D. C. Code). This was conceded by opposing counsel and also by Justice Adkins (R. 12) in overruling motion to dismiss the Shaw-Walker bill. The same ruling was made on final hearing by Justice Gordon, who heard the instant proceeding for dissolution of the corporation (R. 116). It was also conceded by Justice Rutledge, of the Court of Appeals, in his opinion in the instant case, concurred in by Chief Justice Groner and Justice Stephens (R. 504).

X.

The aforesaid *Pinkett* suit was heard on final hearing on February 29, 1932 (R. 157), before Justice O'Donoghue, holding District Court, when he, erroneously, viewing the supposed equity of the Pinkett bill as being one for the dissolution of the said corporation (see his opinion, R. 154-156), which it is not, and which was subsequently conceded by counsel for all parties, as well as by trial and appellate Judges, as above set forth, entered a final decree (R. 157-8), declaring the corporation insolvent, and appointing Gilbert A. Clark and Frank B. Bryan, Jr. (respondents herein), permanent Receivers, with authority and direction to carry on the business and to administer the affairs of the company (*with the exception of writing new insurance*), which decree was in excess of the jurisdiction of the Court. The decree in the *Pinkett* case also provided (R. 158)—likewise in excess of the jurisdiction of the Court—that the Court would defer a decree for the dissolution of the corporation until after the final report by Receivers Clark and Bryan, Jr., embodying a detailed and actuarial account and report by them so as to afford ample opportunity to said company, its officers, stockholders, and/or policyholders to formulate and effectuate any plan for the rehabilitation or reorganization of said company, independently, or with the co-operation of the Receivers, subject to the approval of the Court (R. 158). No decree of dissolution of the corporation was ever entered in the *Pinkett* case, or could be, nor was the company ever rehabilitated or reorganized.

The opinion of Justice O'Donoghue (R. 155), among other things, sets forth:

> "This Court is not unmindful of the fact that there are nearly 200,000 poor people that are interested in this litigation, many of whom have

> put all of their little savings in this company to insure them something in a day of stress or in a time of need."

Justice O'Donoghue's decree was entered on February 29, 1932 (R. 157) and to this date no liquidating dividend has been paid by Receivers Clark and Bryan to policyholders and other creditors.

Justice Gordon held Justice O'Donoghue's decree void, and the opinion of Justice Rutledge of the Court of Appeals (concurred in by Chief Justice Groner and Justice Stephens) held it valid in the instant case.

It is significant that no findings of fact or conclusions of law were made by Justice O'Donoghue, holding the District Court, in the *Pinkett* case.

XI.

The facts pertaining to the setting-up and the total collapse of an illegal insurance business conducted by the Pinkett Receivers, Clark and Bryan, in Equity Cause No. 53,391, resulting in a loss of over one million dollars of assets belonging to the creditors of the insolvent corporation, as disclosed by the record herein.

Notwithstanding the decree in the *Pinkett* case prohibiting the writing of new life insurance business (R. 157), but in keeping with the unlawful purpose, plan and scheme of the Pinkett bill (R. 137-145), praying for Receivers "with full power and authority to manage, operate and control," first, by temporary receivers and then by permanent receivers, a life insurance company, *in insolvency,* Justice O'Donoghue, on April 8, 1932—thirty-nine days after the date of his final decree—entered an *ex parte* order (R. 275-277), based upon the

petition of Receivers Clark and Bryan, which authorized and directed the Receivers to set up a life insurance business,

> authorizing and directing them: (1) to ascertain, by actuarial and accounting examination, the interests of all policyholders in the defendant corporation as of the close of business on September 9, 1931; (2) *to ascertain the value of all policyholders' equities as of September 9, 1931, in terms of paid-up insurance and cash dividend,* and to report to the court for further instructions in the event said values were less than the obligations assumed by the defendant corporation under its contracts with said policyholders; (3) to represent to policyholders that, if on final accounting, the amount of the impairment and insolvency of the defendant corporation is determined to be greater than the amount of paid-in capital and surplus, the equities of the policyholders in the assets of the defendant corporation will be fixed as of September 9, 1931, the day prior to the filing of the plaintiff's (*Pinkett's*) bill of complaint; (4) *to modify, with the consent of the policyholder,* in each case, *any and all existing contracts of insurance of The National Benefit Life Insurance Company, upon such terms as may be mutually agreeable and which permit the receivers to accept premium payments from the policyholders on an equitable basis and will permit the receivers to meet the obligations assumed in such modification agreements* provided, that all such agreements shall be subject to ultimate determination by the court that the paid-in capital and surplus of the defendant corporation is less than the impairment and insolvency with full restoration of all contract rights of policyholders in the event that the defendant corporation is found to be able to meet in full its obligations or is restored to a condition of solvency; the said order of April 8, 1932, also provided that no equity or asset of value shall be created for stockholders out of any concessions or waivers made by policyholders; that said order of April

8, 1932 (R. 275-277) authorized and directed said Receivers as follows: (1) *to enter into agreements modifying existing contracts of insurance only upon sound actuarial advice and the general plan, purpose and effect of such modifications, with such adaptations as shall be required by the various forms of insurance contracts.* shall be: (a) *to reduce the amount of insurance benefit payable to such amounts of insurance as the premiums being paid would in each case purchase on the first premium date after September 9, 1931;* (b) *to remove temporarily, the liability of the defendant corporation arising under provisions for non-forfeiture, loan and cash surrender values;* (c) to reduce liability by eliminating total and permanent disability provisions as well as additional accident benefits, with suitable adjustments therefor; (d) required said receivers to keep separate account of funds received for premium payments after September 9, 1931, and to charge against such funds all expenses pertaining thereto; (e) *required said receivers to set up proper legal reserves on the modified contracts;* (f) *authorized the receivers to make investments from funds received from such payments;* (g) the receivers were authorized to pay death claims arising on the modified contracts; (h) *authorized the* receivers to revive and keep in force, as modified, all *insurance contracts in force on September 9, 1931;* (i) *authorized the receivers to make all such modified contracts participating insurance with the right to policyholders to share in the surplus earnings of such contracts, the receivers to take such steps as may be necessary to carry out any obligation assumed in accordance with the foregoing general plan of modification* (R. 275-277).

XII.

On May 3, 1932, Daniel C. Roper, temporary receiver in the *Pinkett* case, who operated the insolvent insurance business of the defendant corporation from September

9, 1931 (R. 228), to February 29, 1932, when he resigned (R. 228), filed his final report and accounting, setting forth, among other things, that the insurance company owned assets, *in the sum of $3,768,472.12* (R. 238), and that he turned over said assets to his successors, Clark and Bryan, permanent receivers.

On April 29, 1932, Receivers Clark and Bryan, respondents herein, filed (R. 296) their report under equity rule 69, setting forth that at the time of filing their bond the value of the assets of the insolvent insurance company was *$3,768,472.12* (R. 296), *in which was listed $143,922.78 in cash* (R. 289).

Acting under the said order of Court, dated April 8, 1932, Receivers Clark and Bryan, proceeded to illegally use the assets of the insolvent company turned over to them by the temporary receiver, *in the initiation and promotion of their modified insurance program, entering into new contracts of insurance with approximately 65,000 policyholders of the insolvent defendant corporation* (R. 161), *collecting premiums in excess of one million dollars ($1,000,000)* (R. 376-386) *from the policyholders who accepted the Receivers' modification plan, and paying claims arising under the said modified contracts of insurance on the basis of 100% on the face value of said modified contracts of insurance* (R. 372, 385).

The unlawful operation of the life insurance business of the Receivers of the insolvent defendant corporation, under orders of the Court, as prayed in the Pinkett bill, all of which was in excess of the jurisdiction of the Court, and in violation of the local statutes prohibiting an insolvent life insurance company, or its officers or solicitors, to write contracts of insurance (secs. 171, et seq., title 5, 1929 D. C. Code, R. 482-486), resulted disastrously to creditors of the defendant corporation.

After operating for seventeen months, the Court in the *Pinkett* case entered an order, dated August 31, 1933 (R. 159), based upon the petition of Receivers Clark and Bryan, *instructing them to discontinue the collection of premiums upon all policies of insurance* (R. 159) *theretofore modified by them under the said plan of modification, authorized by the Court* (R. 160), *and providing for liquidation by sale of all property, except books, papers and documents of the company* (R. 160).

On December 8, 1937, Receivers Clark and Bryan filed in the *Pinkett* case their final report (R. 160-169) and attached their account thereto (R. 420-422). Said account, entitled "Consolidated Statement of Cash Receipts and Disbursements" (R. 422), discloses that for the first time the Receivers consolidate *the modified* and *the unmodified* insurance businesses of the insolvent company and the insolvent receivership, and it further discloses for the first time that the Receivers report only for the period, March 1, 1932, to November 30, 1937 (R. 422), whereas in all their previous reports they covered the period from September 9, 1931, to the date of each of their respective reports. The said report also discloses (R. 422) the Receivers' account for income for the said mentioned period, in the sum of $1,337,948.26 (R. 422) and disbursements in the sum of $1,101,487.46 (R. 422), AND A BALANCE FOR DISTRIBUTION TO ALL CREDITORS IN THE SUM OF $236,460.80 (R. 422)!

Based upon the last named amount set forth by Receivers Clark and Bryan, being the sum available for distribution to creditors, has now been reduced from the sum of $1,985,987.29 (R. 401), or, approximately, twenty per cent, the ratio of assets to liabilities, to the sum of $236,460.80 (R. 422), or, approximately, four

per cent. The last named sum and percentage are subject, of course, to be reduced by preferred claims and the cost of distribution, *but the alarming problem confronting the creditors is the effect that the liability, in the sum of $7,813,308* (R. 377) *of insurance contracts entered into unlawfully by Receivers Clark and Bryan, in excess of the jurisdiction of the Court in the Pinkett case, with 36,567 policyholders* (R. 377) *of the insolvent defendant corporation, which were in force, according to the report of said Receivers, filed with the Court in the Pinkett case on July 10, 1933* (R. 372), *or the sum of $7,025,138 of insurance contracts entered into by said Receivers Clark and Bryan in the Pinkett case with 35,671 policyholders of the insolvent defendant corporation, which were in force on June 30, 1933* (R. 391), *as shown by the report of Receivers Clark and Bryan, filed by them in the Pinkett case on August 26, 1933* (R. 385). *The said report further discloses that many of the aforementioned contracts of insurance run for periods of 35 to 50 years, every one of which was breached by Receivers Clark and Bryan without previous notice to policyholders and without affording them an opportunity to be heard, and without any refund of premiums collected, which is disclosed by the sworn petition of said Receivers Clark and Bryan for instructions* (R. 381-385), *upon which the order of liquidation, signed on August 31, 1933, was based* (R. 159-160).

If all of the remaining assets in the hands of Receivers Clark and Bryan were used in refunding what they collected from parties to their insurance contracts, the same would be insufficient by several hundred thousand dollars and not one cent of the assets valued at $3,768,472.12 on the date of insolvency would be available to pay dividends to creditors of the defendant corporation.

XIII.

Among other void orders passed in the *Pinkett* case, of which case Justice Gordon's decree in this dissolution suit (reversed by decree of Justice Rutledge of the Court of Appeals) adjudicated that the trial court had no jurisdiction (R. 132), two unusual ones should be mentioned (1) *ex parte* order of Chief Justice Wheat, dated December 21, 1931 (R. 227), upon the petition of the temporary receiver of defendant corporation (R. 225-7), whereby said temporary receiver was authorized and directed to remove from this jurisdiction, parts of the assets of said insolvent corporation (having its principal business and domicile in the District of Columbia) consisting of all of the mortgages, mortgage notes, fire insurance policies, certificates of title and all other papers relating to said mortgages, where the same are secured on property located in the State of Georgia, "aggregating a considerable sum of money in excess of $200,000" (R. 225, petition, temporary receiver), to be turned over to Daniel C. Roper and Lewis A. Irons as ancillary receivers of the defendant corporation for the State of Georgia, *and to accept the receipt of said ancillary receivers for said assets* (R. 228). These prime assets were never returned to this jurisdiction nor were the proceeds derived therefrom ever paid over to the temporary receiver, or to his successor Receivers, Clark and Bryan, in the *Pinkett* case, or in any manner accounted for in the latter case other than a mere receipt therefor as indicated by the order of Chief Justice Wheat; (2) *ex parte* orders authorizing and directing Clark and Bryan, Receivers, to withdraw certain bonds and securities aggregating $100,000, which had been deposited by said insurance company on December 14, 1925 (R. 297-302), prior to receivership, with the Commissioners of the District of Columbia, under

written trust agreement (R. 299-301), in trust for the benefit of any and all policyholders (R. 297); that said Receivers withdrew said bonds and securities (R. 302-5); order was entered authorizing sale (R. 305-8); order entered authorizing Receivers to hypothecate said bonds and securities (R. 308); order entered (R. 312), authorizing and directing Receivers to apply proceeds from sale or hypothecation of the bonds and securities to the payment of expenses of temporary receivership as directed to be paid by them by order dated March 27, 1933, which provided for payment of $15,000 to temporary receiver for services and $12,000 to his counsel for services (R. 310-311).

XIV.

Process and a copy of the bill for dissolution were duly served upon the president of the defendant insurance company (R. 179). Respondents Gilbert A. Clark and Frank B. Bryan, Jr., the so-called custodian Receivers of the defendant corporation in the previous equity suit (No. 53,391) entitled *John Randolph Pinkett v. The National Benefit Life Insurance Co.* (and not the corporation), assuming to act in behalf of the corporation, filed on May 27, 1933, a motion to consolidate this dissolution suit with the so-called *Pinkett* case (which had been already heard, on final hearing, on February 29, 1932) (R. 157-8), but the motion was denied (R. 177).

The so-called Receivers (respondents Clark and Bryan, Jr.) filed (R. 10-11) on June 21, 1933, a motion to dismiss this dissolution suit, but that motion was denied (R. 13) by Justice Adkins of the District Court, who rendered a written opinion (R. 11-13), holding that, notwithstanding the pendency of the *Pinkett* suit, the plaintiff was entitled to maintain this dissolution suit.

Thereupon, said custodian Receivers, Clark and Bryan,

Jr. (respondents herein), assuming to exercise the corporate function and powers of the defendant corporation, filed an answer (R. 14-18), in which they prayed for a dismissal of the bill.

STIPULATION.

A stipulation (R. 19) was entered into between counsel for the plaintiff and counsel for said custodian Receivers (the corporation not appearing to contest the dissolution suit) in which the substantial allegations of the bill of complaint were conceded (R. 19-22), and the cause was heard upon final hearing upon bill, answer of Receivers, stipulation and oral evidence (R. 24-100). The 9th paragraph of the stipulation provided that, subject to objections as to the relevancy, materiality and competency, the Court, without formal proof thereof, may consider any and all records, papers, pleadings and orders of Court in anywise connected with the case of *John Randolph Pinkett v. The National Benefit Life Insurance Company* (Equity 53,391), pending in the trial court (in which Clark and Bryan, Jr., had been appointed permanent receivers) and no objection being made, the said record in that case was considered by the Court (R. 22).

At final hearing of this dissolution case, counsel for the custodian Receivers *conceded* that the plaintiff, Shaw-Walker Co., petitioner herein, was entitled to a decree of dissolution of said defendant corporation.

On page 79 of the transcript of record, the following appears:

> *"The Court: You cannot go outside the allegations of the pleadings. What they have alleged in the pleadings has all been admitted.*
>
> *"Mr. Laws: It has practically all been admitted. I have not made any objection to any question*

intended to show anything in Mr. David's pleadings.

"Mr. David: Do you think there ought to be dissolution?

"Mr. Laws: I think eventually there should be.

"Mr. David: What do you mean by 'eventually'?

"Mr. Laws: I think after the case is closed out, the assets disposed of—the real estate.

"Mr. David: I thought so.

"Mr. Laws: After the real estate has been disposed of.

"Mr. David: The attorneys for the Receivers won't leave anything.

"Mr. Laws: You get a lot of joy out of my saying 'asset' and not 'real estate.'"

(Messrs. Laskey and Laws were counsel for Receivers Clark and Bryan, and Mr. David was of counsel for the plaintiff.)

On page 37 of the record, the following appears:

"The Court: In this suit that Mr. David has, is there any question that they are entitled to an order of dissolution?

"Mr. Laskey: *I think not. They are entitled to a holding of dissolution, except that it is within the discretion of the Court as to when it shall be dissolved.* We claim that there is some little real estate and that the preservation of the corporate (R. 38), entity might be a necessity in order to pass title to it. So, we contend that if the Court comes to that conclusion, it might be, in the discretion of the Court, wise to postpone that.

"The Court: Then it narrows itself down to the point that they are entitled to receivers. Then, according to the statute, if there is dissolution, the Court must appoint a receiver? Somebody has to do it?

"Mr. David: Certainly; the statute says so.

"Mr. Laws: The statute does not make it mandatory. The proposition is very plain that if the

> Court feels that the public interests require it, the Court shall do it; the statute is far from being mandatory."

At final hearing of the instant case, Mr. Laws, counsel for Receivers Clark and Bryan, stated to the Court they had no evidence to offer except what was before the Court by way of stipulation (R. 98). The stipulation (R. 19-22) substantially concedes the correctness of the essential allegations of the plaintiff's suit for dissolution of the corporation.

XV.

The District Court (Justice Gordon presiding) entered a final decree (R. 130-133) in favor of the plaintiffs, judgment-creditors, decreeing that (1) they were entitled to a decree of involuntary dissolution of the defendant insurance corporation; (2) restraining the corporation, its trustees, directors and officers, and also Gilbert A. Clark and Frank B. Bryan, Jr., as alleged receivers in the *Pinkett* case (Equity 53,391) from collecting or receiving any debt or demand due to the defendant corporation, and restraining Clark and Bryan from acting as or claiming to be receivers for the defendant, and from exercising any corporate rights and franchises of the defendant; (3) that this dissolution suit *supersedes* the case entitled *John Randolph Pinkett v. The National Benefit Life Insurance Company,* a corporation, Equity No. 53,391; (4) that no jurisdiction existed or exists in the Court *in the Pinkett case* to dissolve the defendant corporation, or to appoint receivers therein, and that the decree appointing said Clark and Bryan receivers was thereby declared void and of no legal effect whatsoever; (5) that all further proceedings in the *Pinkett* case be permanently stayed; (6) appointing John T. Risher receiver, and requiring an undertaking of $50,000; (7) re-

quiring said receiver to file a report, setting forth the assets and liabilities of the defendant; (8) making certain allowances to counsel, and (9) reserving the authority to make further orders or decrees that may be necessary (R. 132-3).

XVI.

The defendant corporation did not appeal from the final decree of Justice Gordon, holding District Court, dissolving the corporation (R. 133), but on March 7, 1939, the attorneys for the custodian Receivers Clark and Bryan, assuming to act for said defendant corporation as though said Receivers constituted the corporation itself and exercised the powers incident to the franchise of the corporation, filed a notice of appeal in the clerk's office (R. 133-4). No appeal was requested by the said Receivers, or by their counsel, of the trial judge, nor was his permission obtained by any order, or otherwise, which authorized the custodian Receivers to appeal from the decree dissolving the corporation.

The record sets forth (p. 134) "Memorandum March 22, 1939 Bond on Appeal for $250.00 filed." One who had never seen that bond might conclude that the defendant corporation had signed it. In our counter-designation (R. 315), we requested that a copy of the bond be included in the record, which was done (R. 209-210). This discloses that the defendant corporation, by its President or any other officer thereof, never signed said bond. The bond is signed "The National Benefit Life Insurance Company, by Gilbert A. Clark, Frank B. Byran, Jr., Receivers, The National Benefit Life Insurance Company." The Fidelity and Deposit Company of Maryland, By Eugene Halley (seal), Attorney in fact, is the surety thereon (R. 209-210). The National Bene-

fit Life Insurance Company is not described in the bond as a corporation, and no officer thereof executed the same, and the corporate seal is not attached thereto.

XVII.

The appeal was docketed by the custodian Receivers of the defendant corporation in the Court of Appeals on March 30, 1939. On April 1, 1939, your petitioners (appellees) filed (R. 425) a motion in the Court of Appeals to dismiss the appeal on various grounds, including the striking (1) the name of The National Benefit Life Insurance Company, corporation, as party appellant, (2) the names of Gilbert A. Clark and Frank B. Bryan, Jr., Receivers of said corporation, as parties appellants, the Receivers not being parties in this dissolution suit, (3) the names of their counsel as attorneys for said corporation; and praying that Receivers Clark and Bryan show cause (a) by what authority they prosecuted this appeal, (b) and that their counsel show cause by what authority they noted an appeal as attorneys for said corporation; (c) and that said Receivers show cause by what authority they affixed the signature of The National Benefit Life Insurance Company to the bond of $250 on appeal, and also by what authority said Gilbert A. Clark signed the name of Frank B. Bryan, Jr., to the alleged appeal bond, or by what authority another signed the name of said Bryan to said alleged appeal bond.

XVIII.

On April 1, 1939 (R. 439) Thurman L. Dodson, Esq., entered his special appearance in the Court of Appeals for the defendant insurance company, and filed the consent of the said defendant corporation to the motion of

your petitioners to dismiss the said appeal, and advised said Court of Appeals that the corporation did not desire to prosecute the appeal (R. 469), annexing thereto a copy of a letter of John T. Risher, President of the defendant corporation, to Receivers Clark and Bryan, dated April 5, 1939 (R. 472), requesting said Receivers to instruct their counsel to withdraw the name of The National Benefit Life Insurance Company as appellant in the Court of Appeals.

The affidavit of John T. Risher, dated April 6, 1939 (R. 473-4), annexed to said consent, sets forth that the affiant personally mailed on April 6, 1939, postage prepaid, his said letter to the said Clark and Bryan *to withdraw the appeal from the decree of Justice Gordon dissolving the said corporation.*

The said letter of the President of the defendant corporation to Clark and Bryan, sets forth, among other things (R. 474):

> "As President of The National Benefit Life Insurance Company, and pursuant to the authority given me by the Board of Directors of the Company, I employed Mr. Thurman L. Dodson to oppose on behalf of the Company, any effort which either you or your attorneys might make to appeal from the decree of Mr. Justice GORDON in the *Shaw-Walker* case, and I propose to set out just a few instances of outstanding injustices to demonstrate the reckless disregard of the rights of thousands of speechless policyholders and other creditors in the management of the affairs of the company by both of you as its receivers and the wasteful squandering of its assets."

The letter then sets forth the facts (R. 467-470) in detail, showing the gross mismanagement of the trust estate and the dissipation thereof by Receivers Clark and Bryan.

The President of the corporation also states in his letter (R.472):

> "The above matters are called to your attention solely for the purpose of indicating why I, as President of The National Benefit Life Insurance Company, think, that in justice and good conscience you should no longer resort to measures calculated to further defeat the efforts of the policyholders and other creditors of this company from reaching its assets and obtaining their share of the few crumbs which now remain.
>
> "You had your opportunity to work out the affairs of this company, having had it in your possession for nearly seven years.
>
> * * * * * *
>
> "The decree of Mr. Justice GORDON affords the only regular method of winding up the affairs of this company, which you had every opportunity to save, and having failed, *I hereby request you to instruct your Counsel to withdraw the name of The National Benefit Life Insurance Company as an appellant in this case and I think in all justice and fair play you should likewise instruct your Counsel to withdraw yourselves as appellants and permit justice to take its course.*" (Italics ours.)

XIX.

The Court of Appeals ordered (R.473) that appellees' motion to strike, to show cause, and to dismiss the appeal be set down for hearing at the time of argument on the appeal.

The motion was briefed and argued. It was overruled (R.513).

In the original opinion of Justice Rutledge, filed January 8, 1940 (R. 513), it was stated:

> "What we have said makes it unnecessary to

pass upon other questions presented by the record and by various motions which have been filed upon appeal. Most of them raise the basic jurisdictional question in some variant form.

"It is argued also that the Pinkett receivers may not prosecute this appeal because, it is said, they have not shown that they obtained leave of the appointing court. *Apart from the fact that they were authorized generally to take exclusive charge of the corporation's affairs and conduct its business, we consider this argument concluded by Palmer v. Morgan,* 45 App. D. C. 334, 341 (1916), *which held that the trial court's allowance of an appeal and approval of the appeal bond is sufficient permission.*" (Italics ours.)

In our motion for rehearing and reargument (R. 528) petitioners pointed out that Justice Rutledge was in error in deciding that your petitioners were concluded by the case of *Palmer v. Morgan,* 45 App. D. C. 334, 341 (1916), *supra,* for the reason that the transcript of the record in that case shows that the Receivers there obtained an order of the trial court authorizing them to appeal. *No such permission was obtained by Receivers Clark and Bryan.*

When your petitioners' motion for a rehearing and reargument was denied, without opinion, the reference to the *Palmer-Morgan* case, italicized above, was deleted from the opinion, and in lieu thereof a footnote (R. 513) was added, which sets forth that the order appointing Clark and Bryan gave them exclusive power to manage the corporation's affairs and enjoined all others from interfering with them.

XX.

The attention of this Honorable Court is particularly invited to Section IV (R. 514) of the opinion of Justice Rutledge, containing a discussion of the unusual handling of the trust estate by Receivers Clark and Bryan.

Among other things, Justice Rutledge says (R. 514):

"What has been said disposes of the present appeal. It is to be understood as limited specifically and solely to the two issues we have decided, namely, that the court had jurisdiction in the *Pinkett* case and that its discretion was exercised arbitrarily in appointing receivers in the instant case and holding that the receivership in the latter supersedes the receivership in the former. In so ruling we wish it to be clearly understood that we express no approval of the manner in which the Pinkett receivership has been conducted. As has been said, the record is replete with charges of misconduct against the Pinkett receivers as well as with assertions that the trial court repeatedly exceeded its jurisdiction in making particular orders in the course of the administration. Criticism has been directed especially toward its actions in permitting the receivers to carry on the 'modified' business and to make payments on matured policy claims while it was being conducted, in making allowances of fees to the receivers and their counsel, and in other respects. For reasons already stated, we make no decision concerning these matters. However, we cannot ignore entirely the fact that the record shows, through the temporary receiver's initial report, that the company's net worth was $2,396,749.29 when the Pinkett receivership was beginning and that now it is charged the assets have shrunk to less than $100,000, apparently without a liquidating dividend. * * *

"In our judgment much of the delay and confusion which has characterized the judicial administration of this company's affairs may be attributed to the haphazard system which has prevailed in the trial court for handling receivership matters. * * *

"At best it may be that the remedy of receivership is worse than the diseases it is applied to cure." * * *(R. 515).